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SUPREME COURT OF THE UNITED STATES
October Term, 1949

No. _____
IN BANKRUPTCY

In the Matter of:

ERNEST NEWTON KALB
Debtor
ERNEST NEWTON KALB
Petitioner

vs.

HENRY FEUERSTEIN and HELEN FEUERSTEIN, Secured Creditors, and OSCAR JACOBSON, Trustee. Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Fred M. Vinson, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Ernest Newton Kalb, petitions this honorable court for a petition for a writ of certiorari to review the decision and judgment of the United States Circuit Court of Appeals for the Seventh Circuit rendered in the above entitled cause on October 21, 1949, which decision affirms the judgment of the United States District Court of the Eastern District of Wisconsin, which decrees,

in substance, that respondents are entitled to an accounting as in an ordinary action, entitled to a credit of all claimed in addition to the mortgage debt, with interest on all annually, and that all should be included in determining the amount necessary to be paid by petitioner in order to redeem his farm, thereby denying petitioner all the benefits of the bankruptcy act and especially Sec. 75-s thereof, whereby said act is judicially repealed as to this petitioner.

Also construes the Wisconsin statute providing for usury and decrees respondents' mortgage debt not usurious, contrary to the decision of the U.S. Circuit Court of the Fifth Circuit (Atwood et us. v. Deming Inv. Co. et al., 55 Fed. 2d, 180) wherein it is held that under the Texas statute containing the same definition of usury, such a mortgage is usurious.

CIRCUIT COURT'S OPINION

The Opinion of the Circuit Court of Appeals has not yet been reported in 177 Fed. Rep. 2d, 243 on Dec. 5, 1949 but it is printed herein in the Appendix, together with the opinion of the District Court of the Eastern District of Wisconsin, is printed herein in the Appendix.

SUMMARY STATEMENT OF MATTER INVOLVED

Litigation has continued for many years between the parties hereto, beginning with the respondent's foreclosure of a mortgage on petitioner's real estate, wherein the mortgage was foreclosed, the real estate sold, and a sheriff's deed

secured by respondents, who remained in possession for eight years. Following a decision of this court (Kalb v. Feuerstein, 308 U. S. 433, 60 Sup Ct. Rep. 343 (1940), and petitioner then petitioning for the benefits of said Sec. 75-s, he regained possession of the real estate, secured the 3-year stay, real estate appraised at $12,000.00 and, prior to the expiration of three years, deposited $5,300.00 in cash with the Commissioners and an assignment of the proceeds of an approved loan from the Federal Land Bank of $7,000.00, and also filed a petition for an accounting, in which he asked credit for the rental due him and damage for being divested of his farm and his farming operations destroyed, and also alleging that respondent's mortgage debt was usurious.

Upon hearing before the Commissioner, respondents were given full credit for all expenditures claimed, with six per cent interest annually, in addition to the mortgage debt with interest included. All claims of the petitioner for damage denied, allowing him only a credit for rental as an offset against respondent's total claim and decreeing that petitioner must pay the appraised value of $12,000.00 to save his farm the balance due respondents being $12,521.25. The accounting was made as in an ordinary action whereby the petitioner must pay his debt in full, principal and interest, less only $521.25, and is denied any and all relief afforded him under the bankruptcy act.

Also decrees respondents' mortgage is not usurious under the Wisconsin statute.

JURISDICTION

The jurisdiction of this court is sought to be invoked under the provisions of Title 28, Sec. 347 of the judicial Code.

A review is requested for the following reasons:

1st. The decree shows that the court approved the accounting which was made as in an ordinary action, giving the respondents credit for all expenditures claimed, with interest on same and on the mortgage debt at six per cent annually, when the record shows the estate insolvent, and gives said respondents credit for said full amount, less a deduction for the rental owing by them to petitioner's estate, whereby the total due respondents exceeds the appraised value and necessitates petitioner's paying same in full, less a nominal sum in excess of the appraised value.

2nd. Decrees that respondents' mortgage is not usurious under Wisconsin statute Sec. 115.05, which statute is, in substance, a duplicate of the Texas statute under which the Fifth Circuit Court held a mortgage usurious.

All of which involves a proper construction of said Sec. 75 as amended, contrary to many other decisions, and decrees the mortgage not usurious, contrary to said Circuit Court's decision, which decision will be accepted as a precedent, if an appeal is not granted.

STATUTES INVOLVED

Sec. 75-s (3) of bankruptcy Act states:

"(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: Provided, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: Provided, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest into court, and he may apply for his discharge, as provided for by this title. If, however, the debtor at any time fails to comply with the

provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this title."

Wisconsin Code Section 115.05 MAXIMUM RATE

"No person, company or corporation shall, directly or indirectly, take or receive in money, goods, or things in action, or in any other way, any greater sum or any greater value, for the loan or forbearance of money, goods, or things in action, than at the rate of ten dollars upon one hundred dollars for one year; and in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest, unless an agreement to that effect is clearly expressed in writing, and signed by the party to be charged therewith."

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The court committed error in allowing respondents interest on all indebtedness found due them, when the record shows that petitioner's estate was insolvent.

2. Allowed Respondents damages in the sum of $1,967.45 for the reconstruction of a large barn for use exclusively as a dairy barn, as found by

the commissioner, whereby its use was destroyed for general farming purposes.

3. Denied petitioner damage for destroying his farming operations, necessitating the sale of his farming equipment in a depressed market and the repurchasing of the same eight years later in a highly inflated market.

4. Denied petitioner any damage for having caused his confinement for fifty-nine days in a county jail under proceedings void for want of jurisdiction.

5. Denied petitioner damages for the cost of litigation and attorney fees.

6. Gave respondents credit for all improvements made prior to appraisement and which were included in the fixing of the value in the subsequent appraisement, and also allowed respondents credit for all such, whereby the respondents secured a repayment for said improvements in the appraised value, and were also given credit for the same as due them, and then found the amount still due them exceeded the appraised value in a nominal sum, thus giving a double credit in determining the appraised value, and the amount necessary to redeem.

7. Committed error in holding that petitioner had failed to make redemption and that the right so to do had expired, whereas, petitioner had deposited $5,300.00 in cash, had rental due him in the amount of $9,248.40, as was subsequently determined, and had assigned the proceeds of a

loan of $7,000.00, and the expiration of said right of redemption was tolled by the filing of a petition for an accounting.

8. Holding the mortgage was not usurious, contrary to the provisions of the Wisconsin statute and to a holding of the circuit court, of the Fifth Circuit.

9. That in so decreeing as above alleged the court, in substance, judicially repeals the Bankruptcy Act, whereby petitioner is denied the benefits thereof.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the U. S. Circuit Court of Appeals, Seventh District, commanding said court to certify and send to this court a full and complete transcript of the record and all proceedings of said circuit court of appeals in the above entitled cause, being No. 9837 on its docket, to the end that this cause may be reviewed and determined by this honorable court, as provided by Sec. 347, Title 28, of the Judicial Code, and that the judgment herein of said court of appeals be reversed by this honorable court, and for such other relief as this court may deem proper.

ERNEST NEWTON KALB
By R. BROWN, Attorney
Address: Creston, Iowa, and
John D. Voss, Attorney
Elkhorn, Wisconsin

SUPREME COURT OF THE UNITED STATES

October Term, 1949

In the Matter of:

ERNEST NEWTON KALB
Debtor

ERNEST NEWTON KALB
Petitioner

vs.

HENRY FEUERSTEIN and HELEN FEUERSTEIN, Secured Creditors, and OSCAR JACOBSON, Trustee.

Respondents

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinions of the United States District Court and of the United States Circuit Court of Appeals of the Seventh Circuit have not as yet

appeared in the official reports and therefore are printed in full in the Appendix postea.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked on the following grounds:

1. That the court made an accounting as in an ordinary action, whereby the petitioner must, in substance, pay as in an ordinary action to save his farm and is denied all the benefits of said Sec. 75.

2. Holds that the respondents' mortgage was not usurious, contrary to the decision of the circuit court of the Fifth Circuit, which decision since its rendition in 1932 has been accepted as a precedent by practically all courts.

3. That, unless the jurisdiction of this court is invoked, said decision will result in a lack of harmony and in erroneous decisions in the future, decisions of both federal and state courts, whereby farmers will be denied the right of redemption, contrary to the intent of congress, as expressed in said Sec. 75 (s) and contrary to the construction of the same by this court.

SPECIFICATIONS OF ERROR

1. The court committed error in allowing creditors interest on all indebtedness found due them, the estate of debtor being insolvent.

2. Committed error in denying petitioner damages for the reconstruction of a large barn for use exclusively as a dairy farm, thereby destroying the use and value to him for general farming purposes.

3. Committed error in denying the farmer damages because of his farming operations being destroyed and necessitating the sale of his farm equipment in a depressed market and repurchasing of the same eight years later in a high, inflated market.

4. Committed error in denying petitioner damages for having caused him to be confined in a county jail for fifty-nine days under proceedings held void by this court.

5. Committed error in denying petitioner damages for the cost of litigation and attorney fees in defending the loss of his farm.

6. Committed error in allowing respondents a recovery for all improvements made while they were in possession and prior to the appraisement, and committed further error in allowing credit for the same in the accounting, whereby the petitioner was, in fact, twice charged with same in computing the amount necessary for him to pay in order to redeem his real estate.

7. Committed error in holding that appellant's right of redemption had expired within three years, as such was tolled by his filing a petition for an accounting.

8. Committed error in denying petitioner credit for the rental found due him as a payment on principal for the purpose of redemption.

9. Committed error in appointing a trustee to make sale of petitioner's real estate.

10. Committed error in not holding respondent's mortgage debt usurious.

ARGUMENT

As to 1:

The court committed error in allowing the respondents interest on any indebtedness found due them, as the record shows the estate was insolvent, debts being $19,921.00, assets $9,093.00, and there being a second mortgage on the real estate, whereby the principal mortgage indebtedness nearly totalled the appraised value.

City of New York v. Saper Trustees,
69 Sup. Ct. Rep. (Mch 1949) 554.
In re Oklahoma Railway Co., 61 Fed.
Supt. (1945) 96.
Kivoichi Fujikawa et al. v.
Sunrise Soda Water Works, 158 Fed. 2d
(1946) 490.
Johnson v. Norris, 1915 B, Lrans, 884.

As to 2:

Committed error in denying petitioner damage for the reconstructing of his large barn for use exclusively as a dairy barn, whereby its value

was largely destroyed to him not so engaged. Respondents are given credit for the cost of so doing, with interest in the sum of $1,967.45. To reconstruct it for general farming purposes will necessitate a similar expenditure.

Hawthorne v. Siegal, 88 Calif. 159,
22 Amr. St. Rep. (1891) 291
63 C. J., page 1013.

As to 3:

Committed error in denying petitioner damages for destroying his farming operations, necessitating the sale of all farm equipment in a greatly depressed market in 1936 and the repurchase of same eight years later, in 1944, in a high, inflated market, and necessitating his securing employment as a day laborer.

63 C. J. 1013.
Fridenheit v. Edmunsen, 36 Mo. 227, 88
Amr. Dec. 141.
Ottawa Gas Light, etc. Co. v. Graham,
28 Ill. 73, 81 Amr. Dec. 263.

As to 4:

Committed error in denying petitioner damages for the respondents having caused him to be confined for fifty-nine days in the county jail under proceedings held by this court to be void. The judgment was not as yet final, as petitioner was prosecuting his appeal to the Wisconsin Supreme Court, and did prosecute it from said court to this court, the United States Supreme Court,

wherein said proceedings were held to be void. Petitioner is not only entitled to damages for the reflection it cast upon his honor and intregrity, but is also entitled to damages for the permanent physical injury he suffered, as shown by the testimony of himself and wife, which was in no way refuted or denied.

63 C. J. 1036 and 1037.
Cody v. Lowry, 91 S.W. Rep. (Texas 1906) 1109.

As to 5:

Committed error in denying petitioner any recovery for the expense of all the litigation forced upon him, and for attorney fees, the conciliation Commissioner holding that all such must be proved, which was affirmed by both the District and the Supreme Court. The verified petition for accounting and the petitioner's testimony fixed the amount of his damages, and no testimony was offered in denial of same. Also testimony as to the cost of litigation is merely advisory to the court and is not binding on the court, it being the duty of the court to determine the reasonable cost of same.

63 C. J. 1026, 1035, 1036 and 1037.
Lurie et al. v. Steckel, 79 Fed Sup. 723.
Campbell v. Green, 112 Fed. 2d, 143.

As to 6:

Committed error in allowing the respondents credit in the accounting for all money and labor

spent on the farm during their eight years in possession, with interest annually thereon to date of the accounting. Credit was given for miscellaneous repairs, $1,440.86; labor and material, $1,967.45; a total of $3,408.31.

If such were judicially made, the value of the farm was increased accordingly and, therefore, was included in the subsequent appraisement, whereby the appraised value was increased in that amount. Not only were they so included in the appraised value, but the respondents were also given credit for the same on what they owed the petitioner in rental, whereby, in computing the amount necessary to redeem, they twice received credit for said expenditures. Those expenditures were made by respondents as trespassers and in violation of law. They were ordinary and unsecured claims against petitioner due from petitioner's estate and, as such, could not affect the amount necessary to redeem in the accounting.

The taxes and insurance were necessary to preserving the property. Respondents' mortgage provided a lien for all such paid and on rental, therefore, only the rental, the taxes and insurance paid could be considered in the accounting fixing the amount necessary to redeem.

The net taxes were $2,261.97; net insurance, $172.40; total, $2,434.37. Rental due petitioner's estate, $9,248.40; net rental owing by respondents, $6,814.03; petitioner's cash deposit, $5,300.00; total credit for redemption, $12,114.03.

The above seems to show conclusively that it was assumed the right of redemption had expired and that the accounting should be made as an ordinary accounting and not under the said Section 75.

Sec. 75-s-3 National Bankruptcy Act, USCA
Sec. 203-s-3.
Miscellaneous repairs, labor and material not a credit against rent.
In Re. 20 Fed. Sup. 240.

As to 7:

Committed error in holding that petitioner's right of redemption expired within three years, as such was tolled by debtor having filed his petition for an accounting.

Petitioner could not make a redemption until it was determined what amount he must pay to do so, and, after such was determined, then petitioner was entitled to a reasonable time to make such redemption. As was held in the Wright case by this court. In confirming the Commissioner's finding that the right of redemption had expired, and as petitioner was given thirty days to redeem, which has now expired, necessarily he is now completely barred of any right of redemption; and, unless this court grants this right, petitioner's real estate is lost to him.

Wright vs. Union Central Life Ins. Co.
311 U.S. 273, 61 Sup. Ct. Rep. 196.
Worley v. Wahlquist 150 Fed. 2d, 1007.
Wragg v. Federal Land Bank, 145 Fed. 2d, 816.

As to 8:

That petitioner was entitled to a credit in the amount of the rental due his estate on the appraised value, see the following:

Federal Land Bank v. Morrison, 133 Fed. 2d, 613.
Hepker v. Equitable Life Assurance Soc., 131 Fed. 2d, 926.

As to 9:

Commissioner had no authority to appoint a Trustee and order a sale, said Sec. 75-a-3 providing that the Court may so do and Chap. 1 "Definition" Par. (7) provides "Court" may include the Referee and the Amendment to Sec. 75 (a) Approved March 11, 1944, provides that the courts may appoint "Conciliation Commissioners" not Referees to be known as Conciliation Commissioners.

Amendment of March 11, 1944, to Sec. 75-a-b-c of Bankruptcy Act, U. S. Code 1940 Edition Supplement IV, Title 11, Section 203, U-SCA 203-a.

As to 10:

Committed error in holding that respondents' mortgage was not usurious. Wisconsin statute 115.05, as amended, provides there shall not be received, directly or indirectly, money, goods or things in action, or in any other way, or any greater sum or greater value for the loan or forbearance of money than ten per cent.

Prior to its amendment, the Wisconsin Supreme Court held that certain additional charges were a penalty, but, under the statute as amended, penalties would necessarily be included as interest. Nor does a court of equity have any authority to enforce a penalty or forfeiture.

In the Atwood case it cites the Shropshire case with approval, holding that anything received under such a statute, including the increase to be received for the forbearance of money, viz., because of default in payment, is necessarily interest.

Respondents' mortgage provides in the event of default it shall earn ten per cent, and also provides that he shall pay the taxes assessed on the mortgage note held by respondents, and will pay all expenses in the event of foreclosure, in addition to taxable costs; therefore, clearly more than ten per cent is exacted, and, since the Wisconsin statute makes everything received for the use or forbearance of money, it necessarily makes all such interest, even if in the nature of a penalty.

Respondents' debt is necessarily usurious for two certain reasons:

1. The Wisconsin statute makes everything of value received interest, which must include a penalty; and

2. If it is a penalty, it would be denied by a court of equity. For the Wisconsin Supreme Court to hold that such a mortgage is not usurious un-

der Section 115.05 would be as erroneous as was its holding heretofore that a state court could proceed with foreclosure proceedings, even though the defendant had proceedings pending under Section 75 in the Federal Court.

To correct that error certiorari was granted, and to correct the errors above enumerated certiorari should be again granted.

Wisconsin Statute, Sec. 115.05.
Atwood et ux. v. Deming Inv. Co., 55 Fed 2d, 180.
Shropshire et ux. v. Commerce Farm Credit Co., 30 S. W. Rep. (Texas) 282.
Ford v. Washington National Bldg. & Loan Asso., 10 Idaho, 30, 109 Amr. St. Rep. 192.
In Re Elmore Cotton Mills, 217 Fed. 810.
Green v. Grant, 96 N. W. Rep. (Mich.) 583.
Van Der Velde v. Wilson, 142 N.W. Rep. (Mich.) 553.
Union Guardian Trust Co. v. Crawford, 258 N.W. Rep. (Mich.) 248.
Miller v. Life Insurance Co., 118 N. Carolina, 612. 54 Amr. St. Rep. 741.

CONCLUSION

The Conciliation Commissioner, having found that the right of redemption had expired, then concluded that all rights under Section 75 (s) had terminated, and, therefore, it was his duty to make an accounting as in an ordinary action, and he thereupon made such. True, he concluded the

petitioner should have thirty days to make redemption; but, since the right of redemption under Section 75 (s) is adjudicated to be lost and the thirty days has expired, necessarily the petitioner has lost his farm, unless this court affords him protection.

If certiorari is denied, the decision will result in endless confusion, conflicting decisions, and in a very large measure a judicial repeal of the Act of Congress, viz., Section 75 (s).

Ernest Newton Kalb, Petitioner,
Sharon, Wisconsin.
R. BROWN, Address Creston, Iowa.
John D. Voss, Elkhorn, Wisconsin.
Attorneys for Petitioner.

Hon. Wm. Lemke (of Counsel)
Washington, D. C.

APPENDIX

Opinion and Findings of Geo. H. Belton, Conciliation Commissioner, as certified for review to the District Court and filed therein October 22, 1948.

(Omitting caption.)

"To the Honorable F. Ryan Duffy,
Judge of the United States District Court,
Eastern District of Wisconsin.

I, George H. Belton, Conciliation Commissioner for Walworth County, Wisconsin, do hereby certify that in the course of the proceedings in said cause before me, upon the hearing of the motion of Henry Feuerstein and Helen Feuerstein for the appointment of a trustee under the provisions of Section 75 (s) (3) of the Bankruptcy Act, as amended, and upon the petition of the farmer debtor for an accounting heard before me at the Court House in the City of Elkhorn, Walworth County, Wisconsin, on the 6th day of May, A.D. 1948, at ten o'clock A.M., the following questions were presented:

1. Did the farmer debtor fail to make redemption, as required by the Bankruptcy Act?

2. Ought a trustee to be appointed for the purpose of liquidating the bankrupt estate?

3. What is the amount due to the secured creditors Henry Feuerstein and Helen Feuerstein after off-setting against said amount the reason-

able rental value of the real estate for the period the secured creditors were in possession?

Upon considering the petition, and after the testimony offered by the parties, and considering the briefs and arguments of Counsel, I made the following orders, to-wit:

"The application of Henry Feuerstein and Helen Feuerstein, secured creditors, for an order appointing a Trustee under the provisions of Section 75 (s) (3) of the Bankruptcy Act, as amended, and the motion of the farmer debtor for an accounting, having come on to be heard pursuant to notice duly given, this 5th day of May, A.D. 1948; and J. Arthur Moran, attorney for Henry Feuerstein and Helen Feuerstein, secured creditors, and H. Brown and John D. Voss, attorneys for the farmer debtor, having appeared at said hearing; and the Conciliation Commissioner having heard the testimony of the parties and the arguments of counsel, does hereby make the following findings:

1. The farmer debtor originally filed a petition under Section 75 of the Bankruptcy Act on November 2, 1934. These proceedings were dismissed on June 27, 1935; reinstated on September 6, 1935; and finally dismissed on March 17, 1936.

2. The United States District Court, on April 16, 1940, refused to reinstate such proceedings, and such refusal was reaffirmed by the United States Circuit Court of Appeals in 116 Fed. 2d 775, and certiorari to the United States Su-

preme Court was denied in 313 U. S. 568.

3. New proceedings were then filed with the United States District Court on May 28, 1941.

4. Since March 12, 1936, until March 31, 1944, the secured creditors, Henry Feuerstein and Helen Feuerstein, were in the physical possession of the property.

5. The farmer debtor filed a new petition in this Court on May 28, 1941. Numerous proceedings were had in connection therewith, but on March 31, 1944, the farmer debtor was restored to the physical possession of his property, and was granted a three-year stay, and has been in possession of the real estate in question since that time. The real estate was appraised at Twelve Thousand ($12,000.00) Dollars, and the farmer debtor was ordered to pay an annual rental of Eight Hundred Forty ($840.00) Dollars.

6. The three-year stay expired on April 1, 1947.

7. On March 28, 1947, the farmer debtor deposited with the Conciliation Commissioner the sum of Fifty-three Hundred ($5,300.00) Dollars, and also filed a purported assignment of an application for a loan to the National Farm Loan Association in the amount of Seven Thousand ($7,000.00). Subsequent thereto, the National Farm Loan Associations advised the Conciliation Commissioner that the approval for the loan had been withdrawn.

8. The Conciliation Commissioner, therefore, finds that no redemption of the mortgaged premises, as provided for in the Bankruptcy Act, as amended, has been made, and that the three-year stay has expired.

9. The farmer debtor has requested an accounting to determine the amount due from the secured creditors as compension for the reasonable rental value for the premises during the period the secured creditors were in possession. Testimony of real estate brokers was offered by the creditors, Henry Feuerstein and Helen Feuerstein, fixing the value per acre of from five ($5.00) Dollars to Seven ($7.00) Dollars, during the period in question, to-wit: from 1936 to 1943, inclusive. Upon the testimony in the record, the Commissioner finds the real rental value of the real estate for the years 1936 to 1940, inclusive to be the sum of Seven Hundred Twenty ($720.00) Dollars per annum, and for the years 1941 to 1943, inclusive, to be the sum of Eight Hundred Forty ($840.00) Dollars. Allowing interest at Six (6%) Per Cent per annum, the rental charge is the sum of Nine Thousand Two Hundred Forty-eight and 40/100 ($9,248.40) Dollars. Attached hereto and marked Exhibit A is a tabulation not reproduced.

10. The farmer debtor also claims that moneys are due him from the secured creditors, Henry Feuerstein and Helen Feuerstein, on the following items:

(a) Damage to soil
(b) Damage to barn
(c) Purchase of personal property

(d) Damage to health of Kalb
(e) Attorneys fees paid by Kalb

11. The testimony in the record shows that the secured creditors, Henry Feuerstein and Helen Feuerstein, while they were in possession of the farm in question, cultivated, tilled, and cropped the farm in the usual and customary manner employed in and about the area where the farm is located, certain portions of the farm were seeded down, and commercial fertilizer was applied. The Commissioner is satisfied from the evidence in the record that the farm was properly cared for during the time that the secured creditors were in possession, and that no damage to the soil resulted from their occupancy.

12. So far as damage to the barn is concerned, the evidence shows that the secured creditors, Henry Feuerstein and Helen Feuerstein, expended the sum of One Thousand One Hundred Fifty ($1,150.00) Dollars in making the barn available for use as a dairy farm, and in installing stanchions and in making certain miscellaneous repairs. The Commissioner finds that no damage resulted to the barn by the repairs made by the secured creditors.

13. The farmer debtor claims that he had personal property on hand in 1936, which he was compelled to sell because of being evicted from the farm in question, and that when he regained possession, he purchased certain personal property, and that the difference between what he sold the personal property for in 1936, and what

he paid for the personal property he purchased in 1944, was Four Thousand Seventy-seven ($4,077.00) Dollars. This claim is not supported by the records in this and in the prior case, and is based upon mere speculation. The Commissioner finds that no damage resulted to the farmer debtor from the sale of personal property in 1936 and from the purchase of personal property in 1944.

14. So far as the farmer debtor's claim for damages to his health is concerned, there is no evidence in the record to support a finding that the farmer debtor sustained any damage to his health by reason of any act or omission of the secured creditors, Henry Feuerstein and Helen Feuerstein. Furthermore, that question was litigated in a case which was instituted by the farmer debtor in the Circuit Court for Walworth County against Roscoe R. Luce, Henry Feuerstein, and others, which resulted in a directed verdict in favor of the defendants, which verdict was affirmed by the Supreme Court in 239 Wis. 256 (1) N.W. (2-d) 176.

15. There is no evidence in the record as to the amount of attorneys fees expended by the farmer debtor, or for what purpose, and the Commissioner finds that the farmer debtor is not entitled to recovery for any attorneys fees expended by him.

16. The judgment of foreclosure against the real estate concerned in favor of Henry Feuerstein and Helen Feuerstein was entered on April, 21, 1933, in the amount of Seven Thousand Six

Hundred Four and 85/100 ($7,604.85) Dollars. Adding interest at Six (6%) Per Cent from that date to the date of hearing, in the amount of Six Thousand Nine Hundred and 15/100 ($6,900.15) Dollars makes a total of Fourteen Thousand Five Hundred Five ($14,505.00) Dollars, which the Commissioner finds is owed by the farmer debtor to the said secured creditors on the mortgage foreclosure judgment.

17. The secured creditors, Henry Feuerstein and Helen Feuerstein, on March 31, 1936, paid and discharged the back taxes against the property in question in the amount of Nine Hundred Thirty-three and 50/100 ($933.50) Dollars, and paid the annual taxes as they matured for the years 1936 to 1943, inclusive. Accruing interest at Six (6%) Per Cent on the amount of said taxes makes a total due for taxes and interest thereon of Three Thousand Five Hundred Ninety-five and 26/100 ($3,595.26) Dollars, which the Commissioner finds is due and owing to the secured creditors, all as appears by Exhibit B, a tabulation not reproduced.

18. During the years 1936 and 1943, inclusive the secured creditors, Henry Feuerstein and Helen Feuerstein, paid the fire and extended coverage insurance on the buildings on said property, in the total amount, including interest at Six (6%) Per Cent, of Two Hundred Sixty-one and 08/100 ($261.08) Dollars, which the Commissioner finds is due and owing to the secured creditors, as more particularly appears from Exhibit B, a tabulation not reproduced.

19. At the time of the hearing, the secured creditors, Henry Feuerstein and Helen Feuerstein, testified as to repairs and improvements made upon the buildings on said premises, including new fencing. The Commissioner finds that such repairs were necessary to preserve and maintain said farm, and that there is due and owing to the secured creditors the sum of One Thousand Four Hundred Forty and 86/100 ($1,440.86) for miscellaneous repairs, and the sum of One Thousand Nine Hundred Sixty-seven ($1,967.00) Dollars for repairs on the farm, including interest, all as appears by Exhibit B, a tabulation not reproduced.

20. The Commissioner therefore finds that there is due and owing to Henry Feuerstein and Helen Feuerstein, the sum of Twenty-one Thousand Seven Hundred Sixty-nine and 65/100 ($21,769.65) Dollars, and that the farmer debtor is entitled to off-set against said sum the reasonable rental value of said farm during the period in which the said secured creditors were in possession, in the sum of Nine Thousand Two Hundred Forty-eight and 40/100 ($9,248.40) Dollars, leaving a balance due to Henry Feuerstein and Helen Feuerstein of Twelve Thousand Five-Hundred Twenty-one and 25/100 ($12,521.25) Dollars.

Dated at Elkhorn, Wisconsin, this 22nd day of June, A. D. 1948.

GEORGE H. BELTON
Conciliation Commissioner."

"It appearing in this case that the debtor has failed to comply with the provisions of Section 75 of the Bankruptcy Act, in that he has failed to re-finance himself within three (3) years as provided by law;

Now, Therefore, It is Ordered, That Oscar Jacobson, Route 2, Elkhorn, Walworth County, Wisconsin, be and he hereby is appointed Trustee under the provisions of Section 75 (s) (3) of the Bankruptcy Act, and his bond is fixed in the sum of Twelve Thousand ($12,000.00) Dollars.

It is Further Ordered, That unless the debtor, within thirty (30) days after the date hereof, which is fixed as a reasonable time, redeem the property in question by payment of the appraised value of Twelve Thousand ($12,000.00) Dollars into the Court, that the Trustee file a petition for the sale or other disposition of the property belonging to the farmer debtor, and that such further proceedings be had with reference thereto as are provided by the Bankruptcy Act in such case made and provided.

Dated this 22nd day of June, A.D. 1948.

GEORGE H. BELTON,
Conciliation Commissioner."

ORDER AND DECREE OF DISTRICT COURT

Order Confirming Order and Findings of Conciliation Commissioner on hearing had in United States District Court Before Hon. F. Ryan Duffy, Judge (Omitting Caption, Recites).

"This matter was heard upon the certificate of George H. Belton, Conciliation Commissioner, and upon the farmer debtor's petition for a review of findings and an order made by said Conciliation Commissioner dated June 22, 1948 (said findings having been made with respect to application of the farmer debtor for an accounting and damages claimed by him against Henry Feuerstein and Helen Feuerstein, secured creditors, and said order appointing Oscar Jacobson as trustee, etc.), and the court having considered the same, together with the records, files and proceedings applicable thereto, and also having considered the arguments and briefs of counsel and being fully advised.

It Is Ordered: That said findings and said order of the Conciliation Commissioner be and the same are in all things confirmed.

Dated at Milwaukee, Wisconsin, this 3rd day of February, A.D. 1949.

(Signed) F. RYAN DUFFY,
Judge."

Endorsed: Filed Feb. 3, 1949.
B. H. Westfahl, Clerk.